UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC.
Employer

and

UNITED FOORD AND COMMERCIAL WORKERS UNION, LOCAL 27
Union

CASE NO. 05-RD-256888

And

OSCAR CRUZ SOSA
Petitioner

AMICUS CURIAE BRIEF OF JOSEPHINE SMALLS MILLER, J.D.

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BRIEF OF AMICUS CURIAE ON THE QUESTION OF THE CONTRACT BAR DOCTRINE

Pursuant to the Notice and Invitation to File Briefs of the National Labor Relations Board ("NLRB") dated July 7, 2020 in the above-captioned case, together with the NLRB's extension of time to file briefs dated September 16, 2020, Josephine Smalls Miller, J.D. respectfully submits this amicus curiae brief on the question of whether to eliminate, modify, or retain the Contract Bar Doctrine.

INTERESTS OF AMICUS CURIAE

Josephine Smalls Miller, J.D. ("JSM") has practiced law for forty years, largely in the area of labor-management relations and employment law, having spent her first ten years of practice as a Field Attorney for the National Labor Relations Board, Region 10, Atlanta, Georgia.

JSM has a long history of litigation in state courts, federal district and appellate courts and advocacy for the rights of employees as well as representation of management in the private sector. JSM has a particular interest in supporting the Congressionally approved mechanisms for ensuring industrial peace and stability while also supporting employee free choice. Consistent with her legal advocacy spanning both labor and management perspectives, JSM submits this amicus brief in support of the Board Contract Bar Doctrine.

SUMMARY OF THE ARGUMENT

The National Labor Relations Act, arguably "the most radical piece of legislation [Congress] ever enacted"[1], was intended to establish a path for industrial peace and stability by giving employees the free choice to engage in collective bargaining through representatives of their own choosing. Industrial peace was always the primary goal of Congress. When Congress granted employees the right of free choice of bargaining representatives, there was a concomitant responsibility of employees to live with their choices, at least for a reasonable time period. Like voters in federal, state, and local elections, choices once made, cannot be disavowed at will.

In balancing employee free choice with the overall goal of industrial peace and stability, the Board has wisely chosen to impose the limited and reasonable period of a three-year contract bar, with a window of opportunity for union decertification. The contract bar doctrine is a reasonable interpretation of the Act, that has been approved by the Supreme Court and by later actions of Congress. Any disturbance of the contract bar doctrine will likely have devastating, and perhaps unintended consequences that undermine Congressional intent, at a particularly inopportune time when inequality of bargaining power for employees is on the increase.

ARGUMENTS

A. The Statutory Goal of Employee Free Choice Has Always Been Balanced by the Equally Important Goal of Promoting Industrial Peace and Stability

[1] Klare, Karl Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 63 MINN. L. REV. 265, 265 (1977)

The basic purpose of the National Labor Relations Act is to preserve industrial peace, including several provisions designed to encourage stable bargaining relationships. See for example 29 U.S.C. § 151, § 8(b)(7)(A), 29 U.S.C. § 158 (b)(7)(A) (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 U.S.C. § 158(b)(7)(B) (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 U.S.C. § 159(c)(3) (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See also *NLRB v. Financial Inst. Employees of America, Local,1182,* 475 U.S. 192, 208 (1986).

Some have even argued that an "individual rights revolution" has emerged in the employment context. "Looking again at the great arc of historical change, unlike collective bargaining, individual employment rights are clearly on an upward trajectory." Colvin, A. J. S. (2016), Conflict and Employment Relations in the Individual Rights Era, Cornell University, ILR School site: https://digitalcommons.ilr.cornell.edu/ articles/1321 (Colvin, 2012). This revolution is said to be "focused particularly on the area of employment discrimination, beginning with the landmark Civil Rights Act of 1964, extending through additional anti-discrimination legislation and blossoming into the current complex system of employment litigation." Id. However, in the age of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991), *14 Penn Plaza v. Pyett*, 556 US 247 (2009) and EEOC abandonment of its policy against mandatory arbitration agreements as a condition of employment (12/2019), employee power to checking the workplace authority and power of management is extremely limited. See The Arbitration Epidemic, Economic Policy Institute, Katherine V.W. Stone and Alexander J. S. Colvin, December 7, 2015

(Mandatory arbitration serves as a strong shield for employers against being subject to the risk and pressures of litigation).

Recognizing that there is often a fine balance to be made between the conflicting policy considerations of "fostering stability in labor relations while assuring conditions conductive to the exercise of free choice by employees," the Board has repeatedly struck that balance by finding a reasonable period during which employees who have chosen union representation will be held to their choice and the union insulated from decertification. Two years was found to be a reasonable contract bar period in *Pacific Coast Association of Pulp and Paper Manufacturers,* 121 NLRB 990 (1958).[2] In *Pacific* the Board took note of the fact that the majority of contracts at that time were of two years or less duration. Id at 992. That period of contract bar was then extended to three years in *General Cable*, 139 NLRB 1123 (1962). The additional year was deemed "relatively slight and fully warranted when viewed in the light of countervailing considerations, including the necessity to introduce insofar as our contract-bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy." *Id* at 1125. In *General Cable* the Board repeated its interest in "balancing the interest of employee freedom to choose representatives, and the interest of stability of industrial relations." Id at 1126.

One of the principal objectives of the contract bar policy, the Board has said, is "to provide employees the opportunity to select representatives *at reasonable and*

[2] See also *Reed Roller Bit Company,* 72 NLRB 927 (1947) when twelve years after the NLRA became law the Board announced its basic 2-year contract-bar rule, discarding in the interest of stability of labor relations a more limited 1-year rule.

predictable intervals". *Pacific* at 993.[Emphasis Added] Never has it been said, as Petitioner herein suggests, that employees' choice whether to be represented for collective bargaining purposes, or to not be so represented, is unfettered. To the contrary, in *Financial* the Supreme Court invoked the " strong national policy of maintaining stability in the bargaining representative," and "[p] ursuant to that policy, *Congress* and the Board had *restricted the opportunities for* employers and *employees to challenge* a certified union's status as bargaining representative." Id. At 196. [Emphasis Added]

Language found in *New England Transp. Co.,* 1 NLRB 130, 138–39 (1936) regarding employees' "unrestricted choice of representatives" does not prove the point claimed by amici. The employer sought to interpose as a contract bar to an election a series of sham individual contracts[3] that it had reached with individual employees. While not central to its decision, the Board found "ground for holding that the agreements are really nothing more than a statement of regulations enforced by the [employer]". Id at 138.

There has always been a "balancing the interest of employee freedom to choose representatives, *and* the interest of stability of industrial relations," taking into consideration multiple facts such as "economic developments resulting from unemployment, the international setting, and technological changes, which tend to complicate and unsettle labor-management relations…. the efficacy of collective agreements, the need to respect their provisions, the desirability of discouraging raids among unions, the wisdom of granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from their relations

[3] There was evidence that the employer played a leading role in the formation of the rival Mechanical Department Union.

with their employers, and the imperative for long-range planning responsive to *the public interest* and free from any unnecessary threat of disruption." *General Cable* at 1126. [Emphasis Added]

Notably the prevalence of three-year contracts as of the time of the decision in *General Cable* was of especial importance to the Board. Id at 1127. This concentration of three-year contracts remains true at present. An analysis of the Office of Labor-Management Standards, Collection of Bargaining Agreements Database, undertaken by the undersigned, establishes that, by far, three-year contracts are the norm in public and private sector collective bargaining contracts. See Exhibits to Amicus Curiae Brief. [4] Thus, Board reliance upon three years as an industrial norm for stability in labor-management relations has been, and continues to be, reasonable.

B. Industrial Stability Requires That Employees' Exercise of Free Choice Regarding Whether or not to Have a Collective Bargaining Representative Must Come With Consequences

"In the political and business spheres, the choice of the voters in an election binds them for a fixed time period. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations." "A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out. It is scarcely conducive to bargaining in good faith for an

[4] Miller, Josephine S., J.D., A Study of U. S. Department of Labor, Office of Labor-Management Standards, Collective Bargaining Agreements Database, Private and Public Sector Agreements (October 5, 2020). The approximate 3,568 contracts analyzed ranged from 1993 effective dates to 2025 expiration dates. Of the contracts analyzed, 1,514 were of three-year duration or 42% of total contracts.

employer to know that, if he dillydallies or subtly undermines, union strength may erode, and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." In *Brooks v. Labor Board*, 348 U.S. 96,100-101 (1954).

In *Brooks* a representation election was conducted by the Board at petitioner's place of business in April 1951, a particular union won by a vote of eight to five, and the Board certified it as the exclusive bargaining representative. A week after the election and the day before the certification, petitioner received a handwritten letter signed by nine of the 13 employees in the bargaining unit stating that they "are not in favor of being represented by" the union. It is within the Board's discretion in carrying out congressional policy to treat the one-year certification period as running from the date of certification, rather than from the date of the election. *Brooks* at 104. A certification, if based on a Board-conducted election, must be honored for a "reasonable" period, ordinarily "one year," in the absence of unusual circumstances.

Certain aspects of the Labor Board's representation procedures came under Taft-Hartley Act in 1947, 61 Stat. 136. Congress was mindful that, once employees had chosen a union, they could not vote to revoke its authority and refrain from union activities while, if they voted against having a union in the first place, the union could begin at once to agitate for a new election. The National Labor Relations Act was amended to provide that employees could petition the Board for a decertification election at which they would have an opportunity to choose no longer to be represented by a union, 61 Stat. 144, 29 U.S.C. § 159(c)(1)(A)(ii). According to Senator Taft, "The bill also provides that elections

shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for 1 year. He remains the bargaining agent until the end of that year." 93 Cong. Rec. 3838. The House decided to reverse the practice under the Wagner Act by inserting a provision which would have limited representation elections to 12-month intervals, but permitted decertification elections *at any time*. It did so as an expression of the prevailing congressional mood to assure to workers freedom from union affiliation, as well as the right to join one. *This provision was rejected in Conference*. *Brooks*, at footnote 8 [Emphasis Added]. Thus, when Congress had the opportunity in 1947 to provide for employees to oust their union at any time, such an amendment was rejected and must also be rejected by the Board.

In *NLRB v. Financial Inst. Employees of America, supra at* 208-209 (1986), citing the Ninth Circuit noted, the Supreme Court said that Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may *limit the timing* of employee challenges to their certified bargaining representative's majority status." [Emphasis added] Congress, the Supreme Court and the Board have thus rejected the unfettered exercise of employee free choice to oust their elected collective bargaining agent at any time, as petitioner in this matter so forcefully seeks.

C. Despite Not Being Found in the Language of the Act, the Contract Bar Rule Has Been Repeatedly Sanctioned by Congress and the Courts Because it Adequately Safeguards "Employee Free Choice"

Congress and the Supreme Court have expressed approval of the Board's contract bar rules despite the absence of any express language in the Act regarding the doctrine.

"Congress referenced the contract bar rule in 1959 when it made several amendments to the National Labor Relations Act. The House Committee on Education and Labor Report [No. 86-741] on the bill that eventually became those amendments mentioned that under the new Section 8(f) applying to construction industry agreements, the "contract bar" to elections would not apply." Michael Hayes, Daily Labor Report, NLRB Opens Pandora's Box on Union 'Contract Bar' Doctrine, July 29, 2020.

For all the claims of petitioner and amici, the right of employees to exercise their choice to decertify unions that are no longer desired has not been hindered. The legal avenues to change union representatives from one to another, or to decertify a union with which workers have become disenchanted pose some hurdles but not insurmountable ones. In 2007-2011, more than 1,300 NLRB decertification elections took place in the United States. Unions won 562 of them to retain bargaining rights, but lost the remainder. FN20 See BNA Daily Labor Report, "NLRB Decertification Elections 2007-2011," June 7, 2012. In the BNA NLRB Elections Statistics, Year-End 2012 Report, the NLRB reported 228 decertification elections in 2012 -- the lowest total in many years. Of those 228 elections, unions lost 141 -- a 61.8 % loss rate, the highest decertification election loss rate in five years.

The fact that the contract bar doctrine is not specifically found within the text of the NLRA is not unusual. Other judicially created doctrines are not found within statutes but have received wide acceptance. The concept of joint employer is not found within the Fair Labor Standards Act but has received judicial interpretation. 42 U.S.C. § 1983 contains no language regarding "qualified immunity", yet this judicially created doctrine has become ensconced in excessive force litigation. The federal exclusionary rule was

given shape by the case of Weeks v. United States, under the Fourth Amendment prohibiting unreasonable searches and seizures. Judicial interpretation and elucidation of statutes is an important and acceptable practice.

D. Any Disturbance of the Contract Bar Rule Will Have a Devastating Impact Upon Labor-Management Relations and Will Undermine Congressionally Validated Policy of More Than Eighty Years

If the Board abolishes the contract bar doctrine, employees will have the ability to seek decertification of their labor union at any time. While this may benefit employers, it may foment dissent among bargaining unit employees and cause the ouster of a difficult-to-work-with union. On the other hand, frequent changes in bargaining representatives will make it difficult to establish a viable relationship with any collective bargaining representative and creates a disincentive to engage in good faith bargaining toward a labor contract. As some scholars have noted, a discontinuance of the contract bar doctrine that has a more than eighty (80) year history could open a Pandora's Box. Michael Hayes, Daily Labor Report, NLRB Opens Pandora's Box on Union 'Contract Bar' Doctrine, July 29, 2020.

We need only look to the impact of Shelby County v. Holder, 570 U.S. 529 (2013) the Supreme Court decision that ruled by a 5-to-4 vote that Section 4(b) of the Voting Rights Act of 1965 was unconstitutional because the coverage formula was based upon data that was over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. The majority reasoned that the passage of time had obviated pre-clearance before particular states could change voting rights laws. In dissent Justice Ruth Ginsberg wrote that "throwing out preclearance when it has worked and is continuing

to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet" and that continuation "would guard against backsliding." Id. at 560, 590.

The concern about "backsliding" was indeed prescient. The decision in *Shelby* County opened the floodgates to laws restricting voting throughout the United States, immediate effects. Within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law. Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal preclearance. Wendy Weiser and Max Feldman, The State of Voting 2018, Brennan Center for Justice.

A wave of laws, including reduced early voting, purging of voters off rolls at a significantly higher rates than non-covered jurisdictions, restrictions on voter registration drives access to voting, and racial gerrymandering. The U.S. Court of Appeals for the Fourth Circuit struck down one such law in July 2016, finding that it targeted "African Americans with almost surgical precision." *North Carolina State Conference of the NAACP et al. v. Patrick L. McCrory, et al,* 831 F.3d 204, 214 (4th Cir. 2016).

An historical return to heightened inequality in bargaining power, comes at a time of increasing hostility towards workers and their advocates. Some courts, employers, conservative groups, and local governments have become more hostile towards labor unions. See First-Contract Campaigns: Implications for Labor Law Reform, in Restoring the Promise of American Labor Law, 75, 75 (2001) (documenting hostility).

Likewise, the Board should be rightfully concerned that overthrowing more than eighty years of precedent regarding union employee voting rights could open floodgates

that, in the present era of hostility toward collective bargaining, could undercut the national labor policy ensconced in the NLRA.

D. The Current Context of Income Inequality, is Comparable to that which New Deal Advocates and Legislators Faced

A central purpose of the NLRA was to offset inequality of bargaining power between employees and employers. Comparable to the 1930s when the Act was passed, income inequality is once again on a steep upward trajectory. "The top ten percent, those families whose incomes were higher than 90 percent of American families, have captured a growing share of income since the 1970s. Their share expanded from around 33 percent in the early 1970s, to 50.1 percent in 2017, only slightly less than its peak of 50.6 percent in 2012. In the past quarter century (since 1993), the incomes of the vast majority of Americans, those with incomes in the bottom 99 percent, grew by 15.5 percent. Meanwhile, the incomes of the top 1 percent catapulted by 95.5 percent, capturing just over half (51 percent) of the overall economic growth of real incomes during this period." Griffith, K. L., & Gates, L. C. (2020). Worker Centers: Labor Policy as a Carrot, not a Stick, Harvard Law & Policy Review, 14(1), 623. "Economic inequality is at its highest point since the Gilded Age, when unionization rates were similarly low." Andrias, Kate, The New Labor Law, 126 YALE L. J. 2, 7 (2016) (attributing wage increases and other work benefits at the local and state levels to the efforts of alternative labor groups). See Andrias, supra note 1, at 2, 5

Unions, conceived of by Congressional architects of the New Deal as the "bulwark against inequality of bargaining power," have declined to their early 1930s level. The percent of employed workers who are members of a union has decreased from its peak

of 33.4 percent in 1945 to 24.1 percent in 1979 and to 10.4 percent by 2017. Griffith, K.L. & Gates, L.C. at 623.

More than ever, the inequality of bargaining power between employees and employers requires a bulwark. Because Congress has not retreated from its expressly stated position favoring collective bargaining through unions as the preferred means of achieving some measure of income equality and resultant industrial stability, neither the Board nor Courts should disturb the wisdom of that policy preference.

Although the Board has broad authority to construe provisions of the Act, deferral to Board decisions "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *Financial*, at 202 citing *American Ship Building Co. v. NLRB*, 380 U. S. 300, 318 (1965). " We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support. Id at 206

Petitioner argues essentially that the time has come for a reevaluation of the basic content of federal labor legislation as being totally grounded upon employee rights. As the Supreme Court has said, "Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959." *National Labor Relations Board v. Insurance Agents,* 361 U.S. 477, 500 (1960). It is for Congress to move to such an undertaking. Having made major revisions to the statute, with full knowledge of

Board and Court acceptance of the contract bar doctrine, Congress has not undertaken to disavow that doctrine despite its legislative authority to do so.

CONCLUSION

For the foregoing reasons the contract bar doctrine should remain intact with the three-year maximum time period for the bar.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the true and correct copy of the Brief of Amicus Curiae Josephine Smalls Miller in Case No. 05-RD-256888 was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel on October 7, 2020:

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